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No. 90-729

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

MADELINE MONTANO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a showing of simple negligence by a union in handling a contract grievance is sufficient to establish a breach of the union's duty of fair representation?

2. If a union may be found to have breached its fair representation duty by simple negligence in handling a discharge grievance, in a situation in which the union's mistake does not prevent arbitration of the grievance or provide the employer reason to believe the grievance is finally settled, is the union liable for any portion of the back pay damages caused by the employer's wrongful discharge? *

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* In addition to the parties shown in the above caption, the Pacific Northwest Bell Telephone Company, a wholly owned subsidiary of U.S. West, Inc., was a defendant in the district court. This corporate defendant was dismissed in an earlier appeal, and did not participate in the second appeal.

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PETITION FOR A WRIT OF CERTIORARI

The Communications Workers of America, AFL-CIO, hereby petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Montano v. Communications Workers of America*, 9th Cir., No. 89-35074 (May 1, 1990).

OPINIONS BELOW

The court of appeals' Memorandum Opinion of May 1, 1990 is reproduced in the Appendix ("App.") to this petition at pp. 1a-4a. The district court's Order and Judgment of December 19, 1988 is reproduced at App. 5a-14a. The district court's Memorandum and Order of October 13, 1987 is reproduced at App. 15a-19a. The

court of appeals' Memorandum Opinion of March 23, 1987 is reproduced at App. 20a-22a. The district court's Memorandum and Order of February 14, 1986 is reproduced at App. 23a-30a. The district court's Memorandum Decision of August 10, 1984 is reproduced at App. 31a-44a. None of these opinions is reported.

JURISDICTION

The decision of the court of appeals was rendered on May 1, 1990. App. 1a. A timely petition for rehearing was denied on July 9, 1990. App. 45a-46a. Justice O'Connor signed an order extending the time for filing this petition to and including November 6, 1990. App. 47a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below.

This is a hybrid suit alleging an employer breach of contract under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and a union breach of the duty of fair representation under the National Labor Relations Act, as amended, 29 U.S.C. § 159. The district court had jurisdiction over these claims under 28 U.S.C. §§ 1331 and 1337.

The district court initially found both an employer breach of contract and a union breach of the fair representation duty and awarded damages against both the employer and the union defendants. App. 44a. On a prior appeal, the court of appeals reversed the judgment against the employer defendant and remanded the case for calculation of the union defendant's share of damages. App. 22a. The district court's judgment against the union defendant on remand was entered on December 19, 1988. App. 14a. On May 1, 1990, the court of appeals affirmed the district court's judgment in part, and remanded for a recalculation of certain elements of damages. App. 4a.

B. Statement of Facts.

The plaintiff, Madeline Montano, was discharged from employment at the Pacific Northwest Bell Telephone Company ("PNB") in May 1977, when she failed to return from disability leave as directed by the Company. App. 23a-24a. Ms. Montano's union, the Communications Workers of America ("CWA"), filed a grievance challenging her discharge as a violation of the Union's collective bargaining agreement with PNB. The Union processed the grievance through all the steps of the contractual procedure without success. App. 24a.

The Company representative verbally denied Ms. Montano's grievance at a meeting on October 6, 1977, and on October 25, 1977 CWA received the Company's written denial. App. 24a. CWA then requested arbitration on November 29, 1977. App. 24a. PNB refused arbitration, asserting that the Union's request was not made within the contractual time limits. App. 25a.

CWA and PNB went to arbitration over the timeliness of the Union's demand to arbitrate Ms. Montano's discharge, reserving the merits of her grievance for later determination. App. 25a. Taking what the district court characterized as a "somewhat technical approach," App. 29a, the arbitrator accepted PNB's argument that the time limit on requesting arbitration began to run on the Company's verbal denial of the grievance rather than, as the Union believed, on the Company's written denial. On this basis the arbitrator ruled that the Union's request for arbitration was untimely. App. 25a.

The arbitrator rendered his decision denying the grievance in April 1979, and one year later, in May 1980, Ms. Montano sued CWA for breach of the duty of fair representation. A year and a half after that, in the fall of 1981, Ms. Montano joined PNB as a defendant. App. 22a.

After a trial on the merits, the district court issued a decision on August 10, 1984, finding that PNB had

breached the collective bargaining agreement by discharging Ms. Montano and that CWA had breach its duty of fair representation by missing the time limit in requesting arbitration of her discharge. App. 37a-42a. With respect to the Union's alleged breach, the district court found: "The record reflects no hint of hostility, bad faith or discriminatory intent in CWA's handling of Montano's grievance. The union was, however, negligent." App. 37a. Following the Ninth Circuit's decision in *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983), the district court concluded that the Union had breached its duty of fair representation by an act of "simple negligence" in missing the time limit on demanding arbitration. App. 38a.[1]

All parties appealed from the district court's first judgment. The court of appeals affirmed the district court's conclusion that CWA had breached its duty of fair representation. App. 21a. With respect to the fair representation issue, the appellate court's opinion stated that "[t]he trial judge properly applied the test set forth in *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir. 1983)," in finding that the Union's "simple negligence" had breached the fair representation duty. App. 21a. The appellate court also ruled that Ms. Montano had not joined PNB as a defendant in a timely fashion, and that the Company should be dismissed from the suit. App. 22a. The court of appeals remanded the case to the district court to apportion damages. *Id.*

On remand, the district court determined that CWA was liable for all of Ms. Montano's lost pension benefits and for all of her lost wages, except for those wages attributable to the first fifteen months after her discharge. App. 11a-14a. The Union appealed, specifically preserving the liability issue decided on the prior appeal. Brief for Appellant Communications Workers of America, 9th Cir.

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[1] PNB reinstated Ms. Montano to employment on October 8, 1984, and she voluntarily resigned on August 29, 1985. Dk. Nr. 176.

No. 89-35074, p. 9 n. 6 (filed June 30, 1989). In a memorandum opinion dated May 1, 1990, the court of appeals affirmed the district court's apportionment of liability for lost wages, reduced the Union's liability for lost pension benefits by fifteen months, and corrected an arithmetic error in the second judgment. App. 4a. The appellate court remanded the case to the district court with directions to enter a money judgment in favor of Ms. Montano according to a formula described in the court of appeals' opinion.

The Union filed a timely petition for rehearing, which was denied by the court of appeals. App. 45a-46a.

REASONS FOR GRANTING THE WRIT

I. SIMPLE NEGLIGENCE BY A UNION IN PROCESSING A GRIEVANCE DOES NOT BREACH THE DUTY OF FAIR REPRESENTATION.

In this case, the Ninth Circuit adhered to its line of precedent holding that "merely negligent conduct" in a union's "failure to perform a ministerial act required to carry out [its] decision" to prosecute a grievance may be the basis for fair representation liability that begins in *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1273 (9th Cir. 1983). *See* App. 21a.

Dutrisac's delineation of the scope of the duty of fair representation, as we show below, is in direct conflict with this Court's ruling in *Steelworkers v. Rawson*, —— U.S. ——, 110 S.Ct. 1904, 1911 (1990), that "mere negligence, even in the enforcement of a collective-bargaining agreement, would *not* state a claim for breach of the duty of fair representation. . . ." (Emphasis added.)

Beyond that, the question of the scope of a union's fair representation duty in handling grievances is a constantly recurring one and the Ninth Circuit's answer to that question is in direct conflict with the law in the Seventh Circuit. Correctly anticipating *Rawson*, the Seventh Cir-

cuit has held that negligence is not a sufficient basis for a fair representation claim. *See Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522-523 (7th Cir. 1981). In addition, while the relevant law in the Third Circuit is not as clear as in the Seventh Circuit, we believe that the *Dutrisac* rule is in conflict with the Third Circuit's law as well. *See Riley v. Letter Carriers Local No. 380*, 668 F.2d 224, 228-229 (3d Cir. 1981) (union negligence causing employee's contract claim to become time barred does not breach the fair representation duty). Further, the First, Second, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have all addressed the question presented here with results that span the spectrum between the polar positions stated by the Ninth Circuit and the Seventh and Third Circuits.[2]

Against this background, we submit that the interest in assuring the uniformity of federal law in this important area calls for summary reversal of the decision below on the authority of *Steelworkers v. Rawson, supra.*

Alternatively, we suggest that this *certiorari* petition should be held pending decision in *Air Line Pilots Ass'n v. O'Neill*, Sup. Ct. No. 89-1493, *certiorari* granted October 1, 1990, since the *Air Line Pilots* case raises a related question as to the scope of the fair representation duty.

Finally, while in our view the *Dutrisac* rule cannot stand after this Court's *Rawson* opinion, if we are wrong

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[2] For recent representative examples see *Early v. Eastern Transfer*, 699 F.2d 552, 556-557 (1st Cir.), *cert. denied*, 464 U.S. 824 (1983); *Young v. U.S. Postal Service*, 907 F.2d 305, 308 (2d Cir. 1990); *Smith v. Local 7898, Steelworkers*, 834 F.2d 93, 96-97 (4th Cir. 1987); *Landry v. The Cooper/T. Smith Stevedoring Co.*, 880 F.2d 846, 852-854 (5th Cir. 1989); *Allen v. Allied Plant Maintenance Co.*, 881 F.2d 291, 297 (6th Cir. 1989); *Stevens v. Highway, City & Air Freight Drivers*, 794 F.2d 376, 377-379 (8th Cir. 1986); *Foust v. Int'l Broth. of Electrical Workers*, 572 F.2d 710, 715-716 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 2066 (1989).

in that regard and if there is still law to be made on the role of negligence concepts in a fair representation suit challenging a union's handling of a grievance, given the manifest, longstanding conflict in the circuits, this petition should be granted and the case set down for plenary consideration.

A. The Ninth Circuit distinguishes "an erroneous decision by the union" from "its failure to perform a ministerial act required to carry out the decision. . . ." *Dutrisac v. Caterpillar Tractor Co., supra*, 749 F.2d at 1273. While the Ninth Circuit "accord[s] substantial deference to the union's decisions," with respect to a "failure to perform ministerial acts," that court has concluded that "judicial deference to the union serves no purpose," and therefore it is "more willing to impose liability for merely negligent conduct" involving such failings. *Id.*

Thus, in order to select the correct legal standard by which to adjudicate a fair representation claim, courts in the Ninth Circuit must first determine whether the challenged union conduct involves a "decision" or a "ministerial act." Further complicating the judicial inquiry, *Dutrisac* limits the imposition of liability for union negligence in carrying out a ministerial act "to cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." 749 F.2d at 1273.

The Ninth Circuit has recently acknowledged that under its approach the "precise contours" of the fair representation duty "have proved difficult for us to delineate" in large part because "differentiating a ministerial task from a judgment call is not always easily accomplished." *Peters v. Burlington Northern Railroad*, —— F.2d ——, 135 LRRM 2585, 2588 & 2589 (9th Cir., Sept. 18, 1990), *pet. for rehearing pending*. Because the Ninth Circuit's approach sets up "a continuum that broadly attempts to separate discretionary decision making from inexplicable conduct," and "obligates [courts] to evaluate the strength

of the employee's grievance," its effect is to require a far-reaching case-by-case inquiry into the adequacy of the union's grievance handling efforts and the merits of the underlying grievance. *Id.* at 2590.

The difficulty of "differentiating a ministerial task from a judgment call" is demonstrated by the facts of this case. The CWA representative handling Ms. Montano's grievance did not forget to demand arbitration or otherwise carelessly miss the time limit. Rather, he made a reasoned determination that the grievance was finally denied—and the time for requesting arbitration began to run—upon receipt of the Company's written denial. App. 24a-25a. The arbitrator—in what the district court characterized as a "somewhat technical approach," App. 29a—ruled that the time for requesting arbitration began to run earlier when the Company verbally denied the grievance at a meeting, App. 25a. Clearly, the union representative was making a "decision" about how to handle the grievance, but since, in the view of the courts below, this was a decision about when to take a "ministerial act" the Ninth Circuit imposed liability for "simple negligence." App. 21a.[3]

[3] The problem is identifying what is a final decision for purposes of calculating the time to appeal is inherent in any system that allows for such appeals but places time limits on their filing. *Compare Federal Trade Comm'n v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 210-211 (1952), *with United States v. Adams*, 383 U.S. 39, 41-42 (1966). Nonetheless, the district court faulted CWA for not designing a grievance system that avoids such problems. App. 28a-29a. That assessment of blame is unfair on two grounds. Designing a particular method of handling grievances is surely nearer to the "discretionary decision" end of the "continuum" defined by the Ninth Circuit than to its "inexplicable conduct" end. *Peters v. Burlington Northern Railroad*, *supra*, 135 LRRM at 2590. Thus, even if it were proper to characterize as negligent the Union's failure to anticipate and foreclose a problem that has plagued the federal courts, that would not constitute a breach of the fair representation duty. Moreover, the district court ignores altogether the fact that the Union does not act alone in framing the grievance procedure, the Union must get the employer's agreement to any

B. The Ninth Circuit's fair representation standard cannot be squared with this Court's recent decision in *Steelworkers v. Rawson*, —— U.S. ——, 110 S.Ct. 1904 (1990).

Rawson involved an action brought on behalf of the survivors of miners who died in a mine accident. The underlying theory of the complaint was that the union was negligent in carrying out its duty to inspect the mine pursuant to the safety clause of its collective bargaining agreement. 110 S.Ct. at 1907. After holding that the plaintiffs' state law negligence claims were preempted by federal law, the Court went on to accept the union's argument that "the case against [the union] may not go forward even under federal law . . . [because] *it is charged with only negligence, which is insufficient to prove a breach of its duty of fair representation.*" *Id.* at 1911 (emphasis added). *See also id.* at 1916-17 (Kennedy, J., dissenting) (agreeing with the majority opinion on this point).

In every legally relevant respect, *Rawson* is identical to this case. The alleged failing in *Rawson* involved, to use the terms of the courts below, a "ministerial, not interpretative function," App. 21a, *viz.*, "inadequately train[ing]" members of the safety committee and "negligently perform[ing] inspections of the mine that it had promised to conduct. . . ." 110 S.Ct. at 1907. And, to again borrow the district court's words in this case, the "stakes" in *Rawson* could not have been "high[er]," App. 21a, as 91 miners lost their lives due to the alleged failure of the union's inspectors to "uncover obvious and discoverable deficiencies." 110 S.Ct. at 1907. Nor can the instant case be distinguished from *Rawson* on the

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system it might propose. "[F]reedom of contract" is one of the National Labor Relations Act's "fundamental policies." *H.K. Porter Co. v. NLRB*,, 397 U.S. 99, 108 (1970). The duty of fair representation, implied from that Act, does not override this principle by granting the federal district courts the authority to design contractual grievance-arbitration procedures.

grounds that CWA's breach was its alleged failure to "maintain a more effective system of keeping track of the timing of grievances." App. 29a. The *Rawson* plaintiffs alleged a similar systemic failure by the union defendant in that case, *viz.*, "inadequately train[ing]" members of the mine safety committee, so that they could not "uncover obvious and discoverable deficiencies." 110 S.Ct. at 1907.[4]

The Ninth Circuit nonetheless refuses to recognize *Rawson*'s definition of the scope of the fair representation duty. The Union's petition for rehearing in this case relying on *Rawson* was denied. Moreover, in *Peters v. Burlington Northern Railroad*, *supra*, the Ninth Circuit undertook a comprehensive review of its fair representation rulings, noted the *Rawson* decision, and then went on to reaffirm that simple negligence in the handling of a grievance is actionable. 135 LRRM at 2589-90. This refusal to conform the Ninth Circuit's fair representation law to this Court's law warrants exercise of the Court's supervisory power over the lower federal courts.

C. The Seventh Circuit, in contrast to the Ninth Circuit, has "adopt[ed] a standard based on prohibited intent because any other approach would embroil the courts in the merits of employment decisions." *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986). The Seventh Circuit has concluded that requiring judicial inquiry into the merits

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[4] As we have noted, the district court acknowledged that the CWA representative's "failure to know when plaintiff's grievance was finally denied was understandable," but that it was the Union's "totally unjustified and inexcusable failure to provide a workable method for ascertaining when a grievance has been denied which forms the basis for my decision that the union's conduct was arbitrary." App. 28a. However, as we have also explained, *supra* p. 8 n.3, the Union's failure to design and bargain for a grievance system that foreclosed such problems cannot be characterized as "negligence" in the performance of a "ministerial act," without so distorting those terms as to deprive both of meaning.

of a grievance, as the Ninth Circuit fair representation precedents do, would unwisely "move the locus of decision from the grievance-arbitration process to the courts" and thereby "both violate the contractual allocation of decisionmaking power and undermine the national policy favoring nonjudicial disposition of labor disputes." *Id.* at 244.

The Seventh Circuit further notes that "[t]he use of a standard based on causation or negligence also would interfere with employees' right to choose the level of care for which they are willing to pay." 786 F.2d at 244. As that court explains, the quality of union performance in the handling of grievances is ultimately a matter of how much the union chooses to invest in that function. "A union may choose to rely on part-time, untrained, overworked grievers—with the inevitable difference in the outcome of some cases—rather than purchase a higher quality of representation." *Id.* at 245. A fair representation standard requiring a certain "quality of representation" inevitably "would compel unions to change the allocation of their resources" and thus "undercut employees' rights to control their own destiny. . . ." *Id.*[5]

The Seventh Circuit, moreover, does not stand alone in this regard. While the Third Circuit law is not as crystal clear as that of the Seventh Circuit, the Third Circuit, too, has rejected the *Dutrisac* approach, as we show in the margin.[6] And, eight of the remaining nine Courts of Ap-

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[5] The Ninth Circuit's difficulty in distinguishing union "decisions" from "ministerial acts" in this case and in *Peters* confirms the Seventh Circuit's point that a fair representation standard based on negligence inevitably results in deep judicial involvement in the most mundane aspects of the contractual grievance procedure. See pp. 7-8, *supra*.

[6] In *Riley v. Letter Carriers Local No. 380*, 668 F.2d 224 (3d Cir. 1981), the Third Circuit considered a claim that a union representative's "possibly negligent" conduct caused an employee's contract claim to become time-barred. *Id.* at 230 n.12. The union representative's alleged negligence was in failing to recognize that two

peals have addressed the question presented here without a uniform response. See p. 6 n.2, *supra.*

In sum, if the decision below is not summarily reversed and remanded for reconsideration in light of *Rawson*, and this petition is not held pending decision in *Air Line Pilots Ass'n v. O'Neill*, the Court should give plenary consideration to this case in order to resolve the circuit conflict over the correct standard to be applied to fair representation claims that challenge a union's handling of a grievance.

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letters from the employer constituted a breach of an agreement to hold a grievance in abeyance, and as a result failing to re-activate the grievance in a timely fashion. *Id.* at 228. While the court found that the union representative's "actions were certainly mistaken, and possibly negligent," it also concluded that such allegations did not state a claim for breach of the fair representation duty. *Id.* at 229. The union's failure in *Riley* was in carrying out what the Ninth Circuit would characterize as a "ministerial act"—re-activating a grievance that had been held in abeyance—but the Third Circuit held that even with respect to such ministerial acts "mere negligence does not constitute a breach of the duty of fair representation." *Id.* at 230 n.12. The Third Circuit's decision in *Riley* is in direct conflict with the Ninth Circuit's decisions in this case and in *Dutrisac*, but at the same time the Third Circuit has not committed itself to the Seventh Circuit's rule that discriminatory intent must be shown to establish a fair representation breach. *Compare Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 961 (3d Cir. 1980) ("To violate the duty, however, it is necessary that union act with a bad faith motive."), *with Findley v. Jones Motor Freight*, 639 F.2d 953, 959 (3d Cir. 1981) ("The perimeters of the minimally acceptable conduct [by a union in processing a grievance] cannot be too lax. . . .").

II. IF A UNION'S ACT OF SIMPLE NEGLIGENCE IS SUFFICIENT TO ESTABLISH A BREACH OF THE FAIR REPRESENTATION DUTY, THE UNION SHOULD NOT BE LIABLE FOR ANY PORTION OF THE BACK PAY DAMAGES CAUSED BY THE EMPLOYER'S BREACH OF CONTRACT WHERE THE UNION'S MISTAKE HAS NOT PREVENTED ARBITRATION OR PROVIDED THE EMPLOYER REASON TO BELIEVE THE GRIEVANCE HAS BEEN FINALLY SETTLED.

The Ninth Circuit compounded its error on the substantive law that applies here by reaching an equally erroneous result on the rule governing the apportionment of backpay liability between employers and unions in hybrid 301/fair representation cases. By so doing, the court below provided a second, independent basis for reviewing this case.

As this Court recognized in *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983), the correct apportionment of damages in hybrid cases involves a careful consideration of federal labor policy as well as the balance of equities between employer and union defendants. In this case, the courts below completely ignored these considerations, and drew a simple-minded identity between cases such as this where the union attempted to redress the employer's contract breach in arbitration, but was prevented from doing so by the fact that the employer seized upon a procedural mistake to prevent an arbitration the union sought, and cases like *Bowen* where the union refused to challenge the contract breach in arbitration.

The judgment in this case imposes backpay liability on the Union that is six times the amount allocated to the Company. This disproportionate liability is placed on the Union even though it was the *Company's* wrongful discharge of Ms. Montano that precipitated the entire dispute and even though the Union did nothing that prevented the resolution of the dispute through the

grievance-arbitration procedure. This result is contrary to this Court's teachings in *Bowen*.

In *Bowen*, "the union had breached its duty of fair representation *by refusing* to take [the employee's] claim to arbitration." 459 U.S. at 220 (emphasis added). This refusal was the basis for shifting a portion of the back pay liability to the union, because "[t]he employer may have done nothing to prevent exhaustion [of the grievance/arbitration procedure]," *id.* at 222, and in such a situation it would be "unjust to require the employer to bear the increase in the damages caused by the union's wrongful conduct" in refusing to seek arbitration, *id.* at 223 (footnote omitted). "[T]he union . . . assumes the responsibility of determining whether to press an employee's claims," and the employer generally "must rely on the union's decision not to pursue an employee's grievance." *Id.* at 225.

In this case, by contrast, CWA insisted on arbitration, but resolution of the grievance was thwarted by the employer's refusal to arbitrate, relying on a technical defense. Thus, it cannot be said that PNB "rel[ied] on the unions' decision not to pursue an employee's grievance." 459 U.S. at 225. In these circumstances, allocating back pay liabiilty to the Union is contrary to the "governing principle" that "damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." *Id.* at 214.

Where the union has not refused to proceed to arbitration or otherwise given the employer reason to believe that a grievance has been finally settled, a union mistake that allows the employer to avoid early resolution of the grievance through arbitration *cannot* be said to cause the increased damages due to the delay in settling the dispute through litigation.

While the result here is inequitable in the extreme, that is only the beginning of the mischief the decision below works. Under the damage allocation rule applied by the courts below, employers have *no* incentive to comply with union demands for arbitration where there is any hope of reaching for a technicality to frustrate the arbitration process. This is so, because under that rule the employer's damages, should the employee bring a successful hybrid suit, *are not one cent more* than the arbitration award would have been had the union been allowed to arbitrate the employee's grievance. Indeed, the employer is encouraged to resist arbitration by the hope that the employee will make a procedural mistake in filing suit that will allow the employer off altogether, as happened here. This result is contrary to the federal policy of encouraging private resolution of labor disputes, and it is most unfair to the union, which is unable by itself to do anything to resolve the dispute.

The damage allocation rule applied by the Ninth Circuit in this case, by encouraging employers to resist arbitration on procedural grounds, exacerbates the adverse consequences of the substantive fair representation standard articulated by that court. If this case is not summarily reversed on the basis of *Steelworkers v. Rawson*, *supra*, the Court should review both of these aspects of the decision below.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

No. 90-729

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

MADELINE MONTANO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-35074

D.C. #CV-80-378-RJM

MADELINE MONTANO,
Plaintiff-Appellee,
v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
DISTRICT 9,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Washington
Robert J. McNichols, District Judge, Presiding
Argued February 21, 1990
Submitted March 21, 1990
Seattle, Washington

MEMORANDUM *

[Filed May 1, 1990]

Before: GOODWIN, Chief Judge, SCHROEDER and FARRIS, Circuit Judges.

This matter is before this panel following our remand in 1987. The case was originally before us on an appeal

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

by both the union and the employer from a judgment in favor of Ms. Montano after the district court found that her employer had wrongfully discharged her and that the union had breached its duty of fair representation.

In our first memorandum disposition, we reversed the judgment entered against the employer, holding that the employer had not been sued within the appropriate limitation period. *Montano v. Communications Workers of America*, Nos. 86-3644/3662/3698, unpublished memorandum disposition at 3 (March 23, 1987) (*Montano I*). We concluded our disposition with what, in retrospect, appears to have been a cryptic instruction that the matter be "remanded for consideration of the appropriateness of apportioning damages. *See* pretrial order, page 29." *Id.*

That language was inspired by the provision in the district court's pretrial order reflecting a stipulation by the parties to the *Montano* I lawsuit that any liability of Pacific Northwest Bell Company (PNB) and the union would be "joint and several," without affecting the defendant's rights to apportionment or contribution. We intended to suggest that the union be held liable only for those damages attributable to its fault. *See Bowen v. United States Postal Service*, 459 U.S. 212 (1983). On remand, the district court, despite some understandable confusion, appears correctly to have interpreted that mandate.

The district court ruled, following *Bowen*, 459 U.S. at 223 and *S.F. Web Pressman & Plakmakers' Union v. NLRB*, 794 F.2d 420, 424 (9th Cir. 1986), that the employer, not the union, would have been responsible for back pay from the date of the wrongful termination to the date the employee would have been reinstated had the union not breached its duty. The court, based upon an affidavit in the record, found that the reasonable time for the arbitration to take place would have been 15 months. The court also awarded attorneys' fees repre-

senting the costs of bringing suit against the employer, and the attorneys' fees awarded by this court in the earlier appeal. Because Ms. Montano's retirement and pension benefits would have vested during the period in which she was wrongfully unemployed, the court ruled an award for lost retirement benefits and lost pension benefits was appropriate. The union appeals.

The union initially maintains that the only damages for which it should be responsible are the attorneys' fees and costs incurred by Montano in suing the employer. It attempts to distinguish this case from the situation in *Bowen* on the ground that here the union did not refuse to file a grievance. It simply filed one late. In both cases, however, the union was found guilty of the breach of its duty of good faith toward the employee, and in both situations the action or inaction of the union resulted in the employee's loss of the contractual right to arbitration. The district court therefore did not err in awarding some back pay damages and pension and retirement benefits lost in addition to the attorneys' fees.

The union also maintains that the district court's award in that regard was in any event too large because the court was attempting to compensate the plaintiff for damages attributable to her lawyer who, for a variety of circumstances unique to this case, is no longer before the court. The district court found that a reasonable time for the employee to be reinstated as a result of arbitration was fifteen months, and this finding is supported by an affidavit in the record. The ruling is therefore not clearly erroneous. The district court did not err when it rejected the 24-month period urged by the union. That period merely represented the time the union and the employee spent arbitrating a different issue.

As to lost pension and retirement benefits, on the other hand, the record contains no evidence to support the district court's amount. It was an estimate which the union

correctly challenges as unsupported. In order to avoid another protracted remand, counsel agreed at oral argument that it would be feasible for this court to order the record supplemented with appropriate data so that the question of the amount of the benefits could be easily determined. Accordingly, we issued an order directing the parties to supply such information, and we have received the parties' explanation of the method to be used to calculate the benefits.

Since we affirm the district court's finding that the length of Montano's service should be reduced by a 15-month period, her pension benefits should be calculated under Method A in the stipulation on the basis of 12.5 years. Given our ruling on this issue, the parties have stipulated that they can now agree on a liquidated sum reduced to present value.

Counsel has also brought to our attention a clerical error in the district court's calculation with respect to another portion of the damages. The district court apparently added $78,663.12 back pay to $15,393.21 in attorneys' fees and reached a total of $97,904.63. The true total should be $94,056.33.

We remand for entry of judgment in accordance with the stipulation of the parties as to pension and retirement benefits. We also remand for correction of the total amount of damages awarded for attorneys' fees and back pay. The judgment is in all other respects affirmed. Appellee is awarded costs.

AFFIRMED IN PART; REMANDED IN PART.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-80-378-RJM

MADELINE MONTANO,
Plaintiff,

v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, DISTRICT 9, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,
Defendants,

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, DISTRICT 9,
Third-Party Plaintiff,

v.

PACIFIC NORTHWEST BELL TELEPHONE COMPANY,
Third-Party Defendant.

ORDER AND JUDGMENT

[Filed Dec. 19, 1988]

The Ninth Circuit Court of Appeals has remanded this protracted case back to this Court to determine the appropriateness of apportioning damages, after having reversed this Court's judgment against defendant Pacific Northwest Bell ("PNB") but otherwise having affirmed. The parties ardently disagree as to what the Circuit has mandated. Upon review of the matter and the parties'

motions, the Court concludes for reasons that follow that defendant Communications Workers of America ("CWA") is liable only for that portion of plaintiff Madeline Montano's damages that it caused, that plaintiff is time-barred from recovering those damages caused by PNB, and that CWA's third-party claim against PNB must be dismissed.

FACTS AND PRIOR PROCEEDINGS

The facts underlying plaintiff's suit are discussed only briefly here, but are more thoroughly presented in a Memorandum Decision by this Court dated August 10, 1984. In May 1977, plaintiff's employer, defendant PNB, wrongfully terminated plaintiff Montano while she was still validly on sick leave. Plaintiff filed a timely grievance with her local union, but was not reinstated. The grievance was forwarded to plaintiff's regional union, defendant CWA. After PNB again denied reinstatement, CWA requested arbitration pursuant to the collective bargaining agreement between CWA and PNB, which agreement provided CWA thirty (30) days to request arbitration if the grievance were denied at the regional level. PNB and CWA disputed whether the request was timely. The parties submitted the timeliness question to an arbitrator, who decided on April 24, 1979 that the request was untimely.

On May 23, 1980, plaintiff brought suit against her union in Spokane County Superior Court, alleging that the union breached its duty of fair representation in failing to file a timely grievance. The suit was removed to federal court on September 11, 1980, since the suit was within § 301 of the National Labor Relations Act, 29 U.S.C. § 185.[1] On October 6, 1980, the union filed a third-party complaint against PNB. Subsequently, plaintiff amended her complaint on November 6, 1981 and joined PNB as a party

[1] Although removal occurred after thiry (30) days, there was no objection to timeliness.

defendant. The defendants later stipulated that any judgment in plaintiff's favor would be entered jointly and severally against both defendants. This stipulation was incorporated in page 19, paragraph 3 of the Pretrial Order dated December 21, 1983, which read as follows:

> The issues raised by CWA's Third Party Complaint and the issue of apportionment of any damages between PNB and CWA shall be reserved for later determination, and any judgment in favor of Montano shall be jointly and severally against both defendants. Such judgment shall be certified as final pursuant to Rule 54(b), but that shall not affect the right to apportionment or contribution by either defendant against the other as hereinafter determined.

On August 10, 1984, this Court ruled in favor of plaintiff on both claims. After several post-trial motions, judgment was entered on September 11, 1985. When other post-trial motions were denied, the judgment was appealed. By unpublished Memorandum dated March 23, 1987, the Ninth Circuit Court of Appeals found that plaintiff's claim against defendant PNB was time-barred, and ruled consequently that:

> The district court's judgment against PNB is reversed and the matter remanded for consideration of the appropriateness of apportioning damages. *See* Pretrial Order, page 29 [19]. The decision is otherwise affirmed. Montano's request for attorney's fees on appeal [$6,725] is granted only with respect to the Union's cross-appeal.

As stated earlier, the parties vehemently disagree as to what the Circuit has mandated. Plaintiff has moved to recover from CWA her entire damages, including uncompensated attorney fees, arguing that CWA can obtain contribution from PNB once the damages are apportioned. Since plaintiff's suit against it is time-barred, PNB has argued the following: (1) that it has no liability at all

either to plaintiff or CWA; (2) that plaintiff can recover only from CWA for those damages caused by CWA; and (3) that this Court should dismiss CWA's third-party complaint against PNB. CWA has made the following arguments: (1) that the judgment against CWA should be modified to exclude any damages attributable to PNB; (2) that, in the alternative, this Court should apportion damages between CWA and PNB; and (3) that plaintiff may recover only those attorney's fees actually paid and necessarily incurred in the plaintiff's suit against the employer, but not those fees incurred in suing CWA.

By Order dated October 13, 1987, this Court determined as follows: (1) that CWA was liable for all of plaintiff's damages, including pension benefits lost between the date of discharge and the date of reinstatement;[2] that, alternatively, CWA was liable for those damages incurred fifteen months after plaintiff's discharge; and (3) that the Court would address the effect of CWA's third-party complaint at a later date.

Whatever course this Court takes, the parties have indicated that they will appeal, again delaying any recovery to which plaintiff is clearly entitled. Hence, in following the Ninth Circuit's mandate, the Court will structure a judgment so that the next appeal in this prolonged litigation will be, it is hoped, the last one.

DISCUSSION

A. LIABILITY

The Court must first determine against whom it can impose liability for plaintiff's injury.

Under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, a discharged employee with a breach of contract claim against the employer and a fair representation claim against the union either may sue both de-

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[2] Upon careful review of the applicable case law, the Court has concluded that this determination was incorrect.

fendants or "may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other, or both." *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 165 (1983). A hybrid § 301 action, however, ordinarily does not trigger joint and several liability on the part of both the employer and the union. *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 312 (6th Cir.), *reh'g denied*, 528 F.2d 912 (1975); *Bellamy v. Roadway Express, Inc.*, 668 F.Supp. 615, 619 (N.D. Ohio 1987).[3]

When the employer has caused damage by wrongfully discharging the employee and the union has increased that damage by breaching its duty of fair representation, the employer and the union are jointly and proportionately, not severally, liable. *Bowen v. United States Postal Service*, 459 U.S. 212, 223 (1983); *S.F. Web Pressmen & Platemakers' Union v. N.L.R.B.*, 794 F.2d 420, 424 (9th Cir. 1986). Damages are to be apportioned between the employer and the union: the employer is liable for damages from the date of the wrongful termination to the date the employee would have been reinstated had the union not breached its duty; and the union is liable for damages thereafter. *Id.* Neither the union nor the employer is liable for damages caused by the other. Although "[o]f paramount importance is the right of the employee, who has been injured by both the employer's and the union's breach, to be made whole," *Bowen*, 459 U.S. at 222, a plaintiff who sues only the union or only the employer may recover only those damages caused by the party sued. *See Smart v. Ellis Trucking Co., Inc.*,

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[3] However, in certain circumstances, an employer and a union may be jointly and severally liable in a hybrid § 301 suit. *See, e.g., Baskin v. Hawley*, 807 F.2d 1120, 1132 (2nd Cir. 1986) (When a union has caused or participated in the underlying wrong of the employer, it is appropriate to hold it jointly and severally liable for the employee's loss); *Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1107 (6th Cir. 1981).

580 F.2d 215 (6th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979).

Here, the Ninth Circuit determined that plaintiff timely brought suit against CWA, but not against PNB. After careful analysis of the Ninth Circuit decision in this case and review of the pertinent precedent in § 301 actions, the Court reaches the follow conclusions:

(1) Since her action against PNB is time-barred and since the stipulation of joint and several liability was considered to be only interim and not binding if PNB were found not liable, plaintiff has no claim for damages caused by PNB;[4]

(2) Plaintiff is entitled to recover from CWA, but only for those damages caused by CWA; and,

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[4] Any claim existing between a plaintiff and a third-party defendant is subject to the applicable statute of limitation; the statute is neither tolled nor waived upon the third-party defendant's timely entry into the action but continues to run until plaintiff actually asserts a claim against him, or, if the time period runs before the action is commenced, serves as a bar to the claim. 6 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1459, at 312 (1971). *See also Frankel v. Back*, 37 F.R.D. 545 (E.D.Pa. 1965) (Plaintiff was barred from amending complaint to join third-party plaintiff had timely impleaded third-party defendant).

Moreover, the Court declines to impose joint and several liability upon PNB based upon the pretrial stipulation dated December 21, 1983. Although a stipulation agreed upon by counsel is considered a binding admission of the parties, *Lyles v. American Hoist & Derrick Co.*, 614 F.2d 691, 694 (10th Cir. 1980), relief from a stipulation embodied in a pretrial order is committed to the district court's discretion and generally will be allowed where the movant demonstrates manifest injustice, lack of prejudice to the nonmovant, and minimal inconvenience to the court. *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1388 (9th Cir.), *as amended*, 817 F.2d 609 (1987). Since the Court agrees with PNB's argument that the stipulation was only interim and was not intended to be binding later on in the proceeding if PNB were found not liable, there has been a sufficient showing to warrant relief from the stipulation.

(3) Since CWA is not being held liable for any damages caused by PNB, under Fed. R. Civ. P. 14(a) PNB is not "a party who is or may be liable to [the defendant] for all or part of the plaintiff's claim against [the defendant]." Accordingly, the Court dismisses CWA's third-party complaint against PNB as it has no validity.

B. DAMAGES

Having decided liability, the Court must now determine the damages to which plaintiff is entitled.

Again, the fundamental purpose of a hybrid § 301 suit is to make the employee whole. *Bowen*, 459 U.S. at 222; *Galindo v. Stoody Co.*, 793 F.2d 1502, 1517 (9th Cir. 1986). An employee is entitled to compensatory damages in a hybrid § 301 action. *Galindo*, 793 F.2d at 1516. Compensatory damages include, but are not limited to, lost wages and such fringe benefits as lost seniority pay, vacation pay, or any actual expenses incurred due to lost medical and life insurance benefits. *Id.* at 1517-18. Usually, back pay and reinstatement will fully compensate a plaintiff. However, where reinstatement is not feasible, front pay, such as pension and retirement benefits, must be awarded to make the plaintiff whole. *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374 (3rd Cir. 1987).[5]

Finally, a plaintiff is entitled to damages from the union to cover the expenses, including attorney's fees and costs, incurred by plaintiff is seeking a fair resolution of his claim against his employer. *Zuniga v. United Can Co.*, 812 F.2d 443, 453 (9th Cir. 1987) (citing *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1275-76 (9th Cir. 1983)). An award of damages which includes plaintiff's expense in prosecuting his claim against the union itself, however, is not compensable since such

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[5] Although *Blum* was a case brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, such cases have been used in this Circuit to determine damages in a hybrid § 301 suit. *See, e.g., Galindo*, 793 F.2d at 1517 n.15.

an award would penalize the union for litigating the issue of whether it breached its duty of fair representation.[6] *Id.*

This Court previously entered judgment on September 11, 1985 against PNB and CWA jointly and severally for back pay damages in the amount of $86,588.00 and attorney's fees in the amount of $19,241.51, for a total of $105,829.51.[7] Since the Court has concluded that plaintiff cannot recover damages caused by PNB, plaintiff can recover only from CWA for those damages incurred after the date plaintiff would have been reinstated had CWA not breached its duty. *Bowen*, 459 U.S. at 223; *S.F. Web Pressmen*, 794 F.2d at 424. As stated in this Court's Order on October 13, 1987, the Court believes that plaintiff would have been reinstated fifteen (15) months after her discharge. Thus, plaintiff is entitled to recover from CWA only those damages incurred fifteen months after her discharge. The Court has determined that the $86,588 back-pay judgment should be adjusted by deducting $7,924.88,[8] leaving a back-pay judgment against CWA in the sum of $78,663.12.

CWA stipulated to the $19,241.51 in attorney's fees, even though the fees were not apportioned. CWA now

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[6] The plaintiff would be entitled to an award of attorneys' fees in prosecuting his fair representation claim against the union under the "common benefit" exception, if the plaintiff " 'necessarily rendered a substantial service to his union as an institution and to all of its members.' " *Dutrisac*, 749 F.2d at 1276 n.3 (quoting *Hall v. Cole*, 412 U.S. 1, 8 (1973)). The Court does not believe plaintiff Montano's suit against CWA comes within the exception.

[7] Of the $105,829.51, $93,829.51 was to bear interest from August 10, 1984, and $12,000 was to bear interest from September 11, 1985.

[8] This deduction is determined by adding the amount of wages plaintiff would have earned from the time of her discharge (May 1977) to the time she should have been reinstated (August 1978), for a sum of $13,504.50, and then by subtracting her earnings and other collateral compensation during that time in the sum of $5,529.62, for a total deduction of $7,924.88.

claims that half of the attorney's fees are not recoverable, but does not substantiate this claim. For the reasons noted earlier, *see supra* p. 7 n.3, the Court will not bind CWA to the stipulation. Nevertheless, plaintiff Montano may recover from CWA those attorney's fees and costs incurred in resolving her claim against PNB. *Zuniga*, 812 F.2d at 453. The determination of the amount of attorney's fees in a hybrid § 301 action is within the "sound discretion" of the trial court, however. *Id.* at 454. In this case, the bulk of the evidence and legal services was devoted to resolving plaintiff's claim against PNB. Upon review, the Court concludes that 80% of the fees and costs incurred by plaintiff were related to the prosecution of her case against PNB. Accordingly, plaintiff is entitled to $15,393.21 in attorney's fees.

The Ninth Circuit awarded plaintiff $6,725 in attorney's fees on appeal against CWA.[9] Plaintiff seeks $2,273.20 in lost retirement benefits, and $29,245.81 in lost pension benefits. The Court believes these amounts are both reasonable and required to compensate plaintiff fully.

Additionally, plaintiff requests $2,273.50 in attorney's fees that were incurred after the original judgment but before the appeal, and $2,501 in attorney's fees that were incurred after the appeal; however, plaintiff's attorney has failed in his request to apportion his time between the claims against PNB and CWA. As to the post-judgment, pre-appeal fees, plaintiff was required to respond to both PNB's and CWA's motions to amend findings and to alter judgment. Reviewing the pleadings to determine the time plaintiff spent prosecuting her claim

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[9] The Ninth Circuit awarded attorney's fees against CWA on its cross-appeal without discussion. While this ruling is arguably inconsistent with other Ninth Circuit decisions allowing such fees only when prosecuting a claim against the employer, the Court is bound by the Circuit's mandate and includes the amount awarded in plaintiff's damage recovery.

against PNB, the Court concludes that plaintiff is entitled to $1,000 in attorney's fees incurred post-judgment but pre-appeal. As to plaintiff's request for post-appeal fees, the Court finds that plaintiff is not entitled to attorney's fees since PNB had been dismissed from the action and since plaintiff at that time sought primarily to recover only from CWA.

CONCLUSION

Based upon the findings stated, the Court enters judgment as follows:

1.) aaginst CWA for $78,663.12 in back pay, with $66,663.12 to bear interest from August 10, 1984 and with $12,000 to bear interest from September 11, 1985, and for $15,393.21 in attorney's fees, for a total of $97,904.63;

2.) against CWA for lost retirement benefits in the sum of $2,273.20 and for lost pension benefits in the sum of $29,245.81, for a total of $31,519.01;

3.) against CWA for attorney's fees awarded by the Ninth Circuit in the sum of $6,725, and for post-judgment, pre-appeal attorney's fees in the sum of $1,000; and,

4.) dismissing the complaint and the third-party complaint and this action in its entirety against PNB.

The Court concludes that no just cause exists for delay and directs the clerk pursuant to Fed. R. Civ. P. 54(b) to enter final judgment.

IT IS SO ORDERED.

DONE BY THE COURT this 19th day of December, 1988.

/s/ Robert J. McNichols
ROBERT J. MCNICHOLS
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-80-378 RJM

MADELINE MONTANO,
Plaintiff,

-vs-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, DISTRICT 9 and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,
Defendants.

MEMORANDUM AND ORDER

[Filed Oct. 13, 1987]

The remaining issues in this case present the court with somewhat of a dilemma.

Montano's employment was terminated by PNB in May of 1977. This court found that PNB had wrongfully discharged Montano and that the Union breached its duty of fair representation. The Circuit reversed the judgment against PNB holding that plaintiff's claim against the company was precluded by the statute of limitations. The Circuit affirmed the judgment in all other respects and stated:

> The district court's judgment against PNB is reversed and the matter remanded for consideration of the appropriateness of apportioning damages. *See* pretrial order, p. 29.

Since the Pretrial Order is only 20 pages long, the Circuit was obviously referring to page 19, paragraph 3, which states:

> The issues raised by CWA's third-party complaint and the issue of apportionment of any damages between PNB and CWA shall be reserved for later determination, and any judgment in favor of Montano shall be jointly and severally against both defendants. Such judgment shall be certified as final pursuant to Rule 54(b), but that shall not affect the right to apportionment or contribution by either defendant against the other as hereinafter determined.

What does all this mean? Was the Circuit saying that the damage award was affirmed as against the Union, but in view of the third-party complaint and the language in the Pretrial Order the court should apportion these damages between the Union and PNB? Conversely, was the Circuit saying that the court should determine what portion of the damages was solely attributable to the Union and reduce the judgment against the Union by the amount of damages which would have otherwise been attributed to the employer?

What significance, if any, is there to the fact that the language in the Pretrial Order uses the term apportionment as well as contribution?

If the Circuit was saying that the court should reduce the judgment against the Union by an amount equivalent to damages caused by PNB why didn't it say so?

Montano argues that the overriding purpose of a section 301 action is to make the employee whole. *Bowen v. United States Postal Service*, 459 U.S. 212 (1983). I accept that premise. *Bowen, supra*, also holds that the Union should not be responsible for damages caused by the employer and vice versa.

Under *DelCostello v. Teamsters*, 462 U.S. 151 (1983), the employee may, if he chooses sue one defendant and not the other but the case he must prove is the same, whether he sues one or both.

Assume for purposes of argument that Montano had never joined the employer in this case, but nevertheless proved the wrongful discharge by the employer. Would Montano still be entitled to be made whole? Would the Union be entitled to relief against PNB under the third-party complaint on the theory that had the employer not acted wrongfully there would be no liability upon the Union?

Instinct tells me that no matter how these matters are resolved at this level, we will have another appeal and this case might eventually reach its tenth birthday. Be that as it may, we are where we are and some finality at this level is required.

The court has concluded that Montano was wrongfully discharged by PNB. It is logical therefore to conclude that had the arbitrator decided the case on the merits, he would have reached the same conclusion. Under that scenario had the Union not dropped the ball by making an untimely demand for arbitration PNB would be responsible for all damages incurred by Montano from the time of discharge until the time of reinstatement.

Arguably, therefore, the damages suffered by Montano subsequent to the arbitration decision, (or a reasonable date when arbitration should have been resolved) cannot be attributed to PNB but would be the sole responsibility of the Union.

Montano argues that this solution does not make her whole as contemplated by the case law. However, the law of this case is that it was through Montano's fault that the statute of limitations outlawed her action against PNB.

It is equally arguable that all of the damages suffered by Montano are attributable to the Union. It was the Union's failure which deprived Montano of a hearing on the merits before the arbitrator.

Counsel have indicated that this case will again go to the Court of Appeals. Consequently, I will attempt to structure the disposition to avoid retrial if the Circuit determines that this court's resolution is inappropriate.

Therefore, the issues in this convoluted case are decided as follows:

1. Had the Union not failed in its duty to Montano, she would have been reinstated and recovered back pay and fringe benefits. Consequently, insofar as Mrs. Montano is concerned, the Union is responsible for all of the damages which she suffered.

2. Those damages shall include whatever pension benefits Montano lost as a result of her unemployment between the date of her discharge and the date of reinstatement.

3. In the event it should subsequently be determined that this court was required to reduce the judgment against the Union by the portion of damages caused by the employer, the only logical way I see to do that would be to reduce the judgment against the Union by an amount equal to the wages and the value of fringe benefits lost by Mrs. Montano from the date of discharge to a date when the arbitration should reasonably have been resolved. A period of fifteen months is reasonable. It is represented that the amount of wages lost during that period was $13,504.50, subject to adjustment for other income she received during that time.

4. I will not further address the issues raised by the third-party complaint until I have had an opportunity to discuss those matters with counsel for PNB and the Union.

I have not attempted to make the mathematical calculations to reduce the foregoing conclusions to precise dollars. I assume counsel can do that by stipulation, reserving rights of appeal. If it cannot be done by stipulation, I should be so advised and a conference will be scheduled.

It is with some reluctance that I toss the ball back to counsel again. However, it is necessary that I have counsels' assistance. I want this case in a posture which will promote a final resolution at the earliest possible time.

Within twenty days after receipt of this Order, counsel shall confer and thereafter submit their comments to the Court in writing or schedule a telephonic conference with the court.

Perhaps any remaining factual issues can be resolved leaving only legal issues for appeal.

IT IS SO ORDERED.

DONE BY THE COURT this 13th day of Oct., 1987.

/s/ Robert J. McNichols
ROBERT J. MCNICHOLS
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-3644/3662/3698

D.C. #CV-80-378-RJM

MADELINE MONTANO,
Plaintiff/Appellant/
Cross-Appellee,

v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, DISTRICT 9, LOCAL 9118; and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,
Defendants/Appellees/
Cross-Appellants.

Appeal from the United States District Court
for the Eastern District of Washington
Robert J. McNichols, District Judge, Presiding
Argued and submitted March 3, 1987,
Seattle, Washington

MEMORANDUM *

[Filed Mar. 23, 1987]

Before: GOODWIN, SCHROEDER, and FARRIS, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Montano's employment was terminated by Pacific Northwest Bell (PNB) in May 1977. The district court awarded backpay and attorney fees to Montano finding that PNB wrongfully discharged her in violation of the collective bargaining agreement, and that Montano's union, the Communications Workers of America (CWA), breached its duty of fair representation. Judgement was entered pursuant to a pretrial order and stipulation. We affirm in part and reverse in part.

Montano appeals the district court's denial of her motion for prejudgment interest on the backpay award. The motion came post-trial but prejudgment. The district court did not abuse its discretion in denying the prejudgment interest award because the parties had stipulated to the amount of plaintiff's damages in a pretrial order. Unless pretrial orders are honored and enforced, the objectives of the pretrial conference, *i.e.*, to simplify issues and avoid unnecessary proof by obtaining stipulations, will be rendered a nullity. *United States v. First National Bank of Circle*, 652 F.2d 882, 886 (9th Cir. 1981).

CWA cross-appeals the district court's finding that it breached its duty of fair representation by failing to request arbitration within the thirty-day period following PNB's denial of Montano's grievance. The trial judge properly applied the test set forth in *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir. 1983), when he stated:

> CWA's negligence was in failing to realize Ms. Montano's grievance had been denied on October 6, 1977; and in not perfecting a timely request within 30 days of that date. CWA's failure was in a ministerial, not interpretative function. The union's unexcused and unexplained failure, though simple negligence, completely extinguished plaintiff's claim. The stakes were too high to make such a mistake.
>
> . . .

Moreover, because the district court found that the grievance denial process was arbitrary, this action also falls within the standards established in *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S. Ct. 903, 916 (1967).

PNB argues in its cross-appeal that the Supreme Court's decision in *United Parcel Service. Inc. v. Mitchell*, 451 U.S. 56, 101 S. Ct. 1559 (1981), applies to this action and mandates the use of Washington's statute of limiations for suits to vacate arbitration awards. That statute, Wash. Rev. Code § 7.04.180 (1974), has a three-month limitations period, the application of which would preclude Montano's action against PNB. Our decision in *Scoggins v. Boeing Co.*, 742 F.2d 1225 (9th Cir. 1984), controls this issue. Montano's cause of action accrued pre-*Mitchell*, PNB was joined as a third-party defendant pre-*Mitchell*, but Montano's joinder of PNB as a defendant took place five months after *Mitchell*. As in *Scoggins*, where the plaintiff did not file his suit until eight months after the Supreme Court announced the *Mitchell* decision, we must apply the three-month limitation period in this case. 742 F.2d at 1228-29. Montano's action against PNB is time barred.

The district court's judgment against PNB is reversed and the matter remanded for consideration of the appropriateness of apportioning damages. *See* pretrial order, p. 29. The decision is otherwise affirmed. Montano's request for attorney fees on appeal is granted only with respect to the union's cross-appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-80-378

MADELINE MONTANO, a single woman,
Plaintiff,

-vs.-

COMMUNICATION WORKERS OF AMERICA, AFL-CIO DISTRICT 9, LOCAL 9118; and PACIFIC NORTHWEST BELL TELEPHONE COMPANY, a corporation,
Defendants.

MEMORANDUM AND ORDER

[Filed Feb. 14, 1986]

Plaintiff, Madeline Montano brought suit against Pacific Northwest Bell (PNB) and the Communications Workers of America (CWA) claiming that PNB unjustly discharged her and that CWA breached its duty of fair representation in failing to timely file her grievance. By Memorandum Decision of August 10, 1984 I found in favor of the plaintiff on both claims. Following several post-trial motions regarding the relief to be awarded, judgment was entered on September 11, 1985. Both defendants now move to alter or amend the judgment pursuant Rule 52(b). Because of the likelihood of review by the Circuit, I will address these motions in some detail.

The facts leading up to plaintiff's claim against defendant CWA are more thoroughly addressed in this court's Memorandum Decision of August 10, 1984 and will only be briefly repeated here. Plaintiff was employed by defendant PNB as a Directory Assistance Oper-

ator. Personal problems and the pressures of work necessitated her taking sick leave in December of 1976. Employees of PNB are allowed a maximum of twelve months sick leave. However, in May of 1977 PNB's medical department concluded that plaintiff's job was the cause of her health problems and that she would never be capable of resuming her job. Plaintiff's supervisor contacted her and told her that she had to quit or be fired. Plaintiff's response was that her personal physician had not yet released her for work. Nonetheless she was then terminated. Approximately 10 days later plaintiff's supervisor offered plaintiff her job back. Plaintiff reiterated that she did not feel ready to return. This resulted in reinstatement of the previous dismissal decision.

Plaintiff filed a timely grievance over her termination with CWA. The grievance was processed at the local level but failed to result in plaintiff's reinstatement. The grievance was then submitted to the CWA regional office for further processing as provided for in the collective bargaining agreement. Plaintiff's grievance was handled by CWA Area Director Frank Mailloux. The mechanics of the grievance procedure were somewhat informal. Meetings were held between PNB and CWA officials every few months. Grievances were either denied orally at the meeting or subsequently in writing. Grievances which were denied orally were sometimes followed by written confirmation. Following denial of the grievance, the union had thirty days to request arbitration.

Plaintiff's grievance was initially presented at a meeting held in August of 1977. It was carried over to the next meeting of October 6, 1977. At the October 6th meeting, plaintiff's grievance was verbally denied by Mr. C.B. Scott, PNB's Assistant Vice President of Labor Relations. This verbal deniel was followed by a "confirmation" letter dated October 19, 1977. Mr. Mailloux received the letter on October 25, 1977. Thereafter, on November 29, 1977 Mailloux mailed an arbitration request to PNB.

PNB took the position that it had issued its final denial of plaintiff's grievance at the October 6th meeting and therefore plaintiff's request for arbitration was untimely. CWA's position was that the letter of October 19th was the company's formal denial and thus it was timely submitted. This issue was submitted to the arbitrator who determined that the company had verbally denied plaintiff's grievance at the October 6th meeting and therefore the grievance was untimely.[1] This action followed.

From the record it was clear that Mr. Mailloux honestly believed that the grievance had not been denied at the October 6th meeting. Thus, I determined that CWA had not processed plaintiff's grievance in bad faith or with any hostility or discriminatory intent. However, I did conclude that due to the important interest at stake, the union's conduct in failing to ascertain when the grievance was denied was negligent. The question then became whether such negligence was actionable as a breach of CWA's duty of fair representation. Relying on *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983) I concluded that it was.

In *Dutrisac*, the plaintiff was discharged for alleged absenteeism. He filed a grievance claiming that his discharge was in fact racially motivated. Plaintiff's grievance was processed to the final point of rejection. Thereafter, the Union had thirty days to request arbitration. The Union representative filed the request two weeks beyond the thirty-day time limit and the arbitrator rejected the girevance as untimely. The Union argued that its conduct in missing the time deadline was at most negligent and that following the standard of care articulated by the Supreme Court in *Vaca v. Sipes*, 386 U.S.

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[1] I feel compelled to comment that a more practical approach by the company and the arbitrator might have avoided much grief and expense to all parties.

171 (1967), it could not be held to have breached its duty of fair representation.[2] The plaintiff argued that missing a time deadline was arbitrary and as such violated the duty of fair representation.

The court recognized that under its prior holdings an unintentional mistake would only be considered arbitrary if it reflected a "reckless disregard" for the rights of an employee but not if it reflected only "simple negligence." *Id.* at 1272. However, the court cautioned against a wooden application of such labels to determine whether or not particular union conduct was actionable. Instead, the court focused upon the nature of the conduct at issue and the impact that imposing liability on the union for such conduct would have on the effective operation of the collective bargaining system. *Id.* at 1273.

The court observed that most of the decisions finding "simple negligence" insufficient to establish a breach of duty involve alleged errors of judgment made by the union in the course of exercising its representative functions. *Id.* at 1273. In contrast, the panel noted that when the challenged conduct is not an erroneous decision by the union but instead a failure to perform a ministerial act required to carry out the decision, courts have been more willing to impose liability for merely negligent conduct. *Id.* at 1273.

The basis for this distinction is found in an examination of the policy concerns which have traditionally compelled courts to accord substantial deference to union decisions. As the Ninth Circuit recently observed:

> If unions were subject to liability for "judgment calls," it would necessarily undermine their discre-

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[2] In *Vaca*, the Supreme Court held that a union breaches its duty of fair representation only when its conduct toward a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith." *Id.* at 190.

> tion to act on behalf of their members and ultimately weaken their effectiveness. In the long run, the cost of recognizing such liability would be borne not by the unions but by their memberships. Not only would the direct cost of adverse judgments be passed on to the members in the form of increased dues, but, more importantly, unions would become increasingly reluctant to provide guidance to their members in collective bargaining disputes. . . .

Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985).

In contrast, as the *Dutrisac* panel recognized, requiring a union to timely pursue grievances does not interfere with union decisionmaking. *Id.* at 1274. Nor does it pose a threat of establishing unlimited liability on the union. *Dutrisac* only imposes liability when the individual employee interest at stake is strong and union negligence is the "solitary and indivisible cause of the complete extinguishment of an employees's rights." *Eichelberger v. N.L.R.B.*, 765 F.2d 851 (9th Cir. 1985).

In this case there can be no question that the plaintiff suffered severe prejudice solely as a result of CWA's failure to timely pursue her grievance. CWA concedes this much. Thus, the threshold requirements of *Dutrisac* have been met. However, as CWA correctly asserts, the court's inquiry cannot end here. Once the threshold inquiry of *Dutrisac* is satisfied, the question of whether union negligence has effected a breach of duty of fair representation requires the reviewing court to "carefully weigh the circumstances of each particular case in light of established principles of law." *Eichelberger* at 855. In this regard, CWA argues that Mr. Mailloux's failure to file plaintiff's grievance in a timely manner was an excusable error of judgment to which traditional precepts of labor law require judicial deference. I must disagree.

First, CWA's argument appears to misperceive the focus of this court's holding. It is not Mr. Mailloux's

failure to recognize that plaintiff's grievance was denied at the October 6th meeting in and of itself which forms the basis for a finding of actionable negligence. As I previously indicated in my Memorandum Decision of August 10th, given the total lack of any definitive system for determining when a particular grievance has been denied, Mr. Mailloux's failure to know when plaintiff's grievance was finally denied was understandable. However, it is this totally unjustified and inexcusable failure to provide a workable method for ascertaining when a grievance has been denied which forms the basis for my decision that the union's conduct was arbitrary.

A different conclusion is not required by the cases relied upon by CWA. In *Ethier v. United States Postal Service*, 590 F.2d 733 (8th Cir. 1979) the union representative erroneously construed the time limits contained in the collective bargaining agreement. The court found that there was no arbitrary conduct since the union representative's only error was in failing to anticipate how the agreement would ultimately be construed by an arbitrator. *Id.* at 736. Unlike the present case, *Ethier* involved a union representative's erroneous belief that the collective bargaining agreement imposed no duty to act within the particular time period at issue. Imposing liability on the union for such conduct would clearly have impacted legitimate union interests in determining what its obligations were under the collective bargaining agreement.

In contrast, Mr. Mailloux knew that grievances could be denied orally. He also knew that he had thirty days to request arbitration following the denial of any such grievance. Imposing liability on the union for its failure to perfect a procedure for determining when a grievance has ultimately been denied does not affect an area traditionally left to union discretion. For this reason this case is also distinguishable from the previously cited *Peterson v. Kennedy* upon which CWA also relies. In *Peterson*, as in *Ethier*, the union representative's conduct

in missing the deadline for filing a grievance was preceded by an erroneous interpretation of the collective bargaining agreement. Again, such is not the case here.

In this case, requiring the union to accurately monitor clearly designated time limits will not ultimately serve to "defeat the employees' collective bargaining interest in having a strong and effective union." *Dutrisac* at 1273. Quite the contrary, imposing liability under the circumstances presented here would encourage the union to maintain a more effective system of keeping track of the timing of grievances. I believe that this was the goal of the *Dutrisac* panel and I reaffirm my prior adherence to that decision. Accordingly, CWA's Motion to Alter or Amend the August 10, 1984 judgment is DENIED.

I now turn to PNB's Motion to Amend the findings. PNB challenged the court's findings concerning the knowledge of PNB personnel. It is argued that the evidence does not support the findings that they had knowledge that plaintiff's physician had not released her to return to work.

Considering the entire record, I am satisfied with the findings as entered. Certainly, Ms. Montano's physician had not released her. There was obviously a lack of communications among the several PNB people involved.

It would have been a simple matter to investigate further to determine her true condition either through the medical facilities within the company or by requesting a report and recommendation by Ms. Montano's physician, Dr. Puddy. The decision to terminate plaintiff's employment was not based on any informed judgment concerning her physical or emotional condition.

The tragedy of this case is that, but for confusion, lack of communication and the somewhat technical approach by the arbitrator, the dispute would have been resolved long ago in an orderly and proper manner.

For the reasons set forth in this memorandum defendants' motions are DENIED.

IT IS SO ORDERED.

DONE BY THE COURT this 13th day of February, 1986.

/s/ Robert J. McNichols
ROBERT J. MCNICHOLS
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-80-378

MADELINE MONTANO, a single woman,
Plaintiff,

-vs-

COMMUNICATION WORKERS OF AMERICA, AFL-CIO DISTRICT 9, LOCAL 9118; and PACIFIC NORTHWEST BELL TELEPHONE COMPANY, a corporation,
Defendants.

MEMORANDUM DECISION

[Filed Aug. 10, 1984]

This is an action by Madeline Montano against the Communication Workers of America (CWA) and Pacific Northwest Bell (PNB). CWA also brings a third-party complaint against PNB. Plaintiff alleges that PNB unjustly terminated her employment and that CWA breached its duty of fair representation.

PNB hired Montano in 1973. She initially worked in Seattle, then transferred to Spokane in May of 1975. Personal problems and work pressure caused Montano's hospitalization on December 10, 1976. Her family doctor referred her to a psychiatrist, Dr. Walter Puddy. He diagnosed plaintiff as suffering from psycho-physiologic asthenic reaction and chronic depressive neurosis caused by job pressure, lack of outside interests and deterioration of family relationships. Medication and therapy improved Montano's condition in the hospital. She was released on December 21, 1976. Out-patient therapy with Dr. Puddy continued for the next six months. As part

of her therapy, Dr. Puddy had plaintiff enroll in several junior college classes. During this period Montano's condition improved. A target date of June (after classes were completed) was set for plaintiff to return to work. All plaintiff's medical expenses were covered by PNB's sickness disability benefits. The maximum coverage for plaintiff was fifty-two weeks.

Throughout her convalescence Montano was required to submit weekly disability reports to PNB. In December and January plaintiff's supervisors, Betty Fechner or Ruth O'Malley, visited Montano in the hospital and at home in order to complete the reports. From February to May, Montano filled out the reports at PNB's offices. During Montano's visits to PNB in the latter part of April both Fechner and O'Malley discovered plaintiff was attending classes at the local junior college. Ms. O'Malley felt that if Montano was well enough to attend school, she was well enough to return to work. Neither O'Malley or Fechner voiced any concern to plaintiff about the matter. O'Malley, however, called Nurse Anne Lise Pedersen of PNB's medical department in Seattle with this information. Pedersen indicated she would confer with the staff physicians.

Dr. Puddy was also required to complete PNB medical forms as to plaintiff's condition. A report dated May 2, 1977 stated that the reasons for Montano's work absence were "tension, depression, insomnia and phobic aversion to her job." On May 10, Dr. James Ahern of PNB's medical department called Dr. Puddy to discuss Montano. The substance of the conversation is disputed. Dr. Ahern died prior to trial but his version of the call is contained in a memo prepared the same day. It states:

> Telephone conversation today with Dr. Puddy, Mrs. Montano's physician, who has submitted a B 402 dated 5/2/77 describing her phobic aversion to her job. He also gave an undetermined date to return to

> work. He on the phone today stated that he feels she has recovered well enough to return to some other kind of work since she is attending Community College and doing very well. I pointed out to him that there was no possibility for transfer to another type of work and as long as he stated she could not return to her previous job she would have to remain on benefits for another seven months before she could be terminated. He then stated that he felt if we confronted her with the option of being fired or returning to work immediately she would return to work and added that in his opinion there was no reason we could not talk to her in this vein.

Dr. Puddy testified that he and Dr. Ahern discussed Montano's motivation to return to work and the *possibility* of a confrontation. There were, however, no details regarding whether the confrontation should take place or when. Puddy felt that plaintiff could be talked to about returning to work; but he assumed there would be some negotiations as to the date. Dr. Puddy at no time orally or in writing released Montano as being able to return to work.

After the conversation with Dr. Puddy, Ahern talked the matter over with Nurse Pederson. The May 10th memo states:

> I then discussed this conversation with Anne Lise who agreed to contact the field and advised them to inform the employee that her benefits would be terminated in the immediate future if she did not return to work but stressed that this would be done only with the understanding that the field would proceed immediately with disciplinary action so that the employee was terminated before she re-established benefits. It is also to be understood by the field that they will guard against the employee claiming she is so upset by the discussion that she

> can't work and is out sick again. If they feel unable to handle the situation in this vein it would be better if she remained on benefits for the additional seven months she has coming and then terminate employment. JA:el

Nurse Pedersen contacted Ruth O'Malley in Spokane the same day. O'Malley testified that she and Pedersen jointly decided on a May 16th return date for Montano. Pedersen testified (by way of deposition) that she did not recall a specific time frame for plaintiff's return.

On May 12, Betty Fechner met with Montano at O'Malley's request and told plaintiff that Dr. Puddy and the PNB medical department had concluded that she could return to work the following Monday. This news quite upset Montano. Fechner's report of the incident states: "[Montano] completely fell apart, stated she was not able to report, that [Dr. Puddy] had put her on stronger medication . . . Madeline appears to be threatened by the thought of returning to her job." Based on these observations Fechner's report concluded that Montano was too ill to return to work and benefits should be continued.

The next day a conference call took place between the Spokane field office and PNB's medical department in Seattle. Among those participating were O'Malley, and District Manager Tony Hines. They talked to Dr. John Hagen, Director of the medical department, about Montano's reaction to the news of the previous day. O'Malley testified that Dr. Hagen concluded that plaintiff was medically unable to handle her job. He proposed a quit-fire option.[1]

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[1] Dr. Hagen was not available at the trial. His testimony was introduced by way of deposition. In his deposition Hagen stated that he did not recall any discussion with the Spokane office. Testimony from the other participants establish that the conference indeed took place.

Three days after the conference call, May 16, 1977, plaintiff met with O'Malley and Fechner. O'Malley told plaintiff that the medical department had concluded that Montano's job was the cause of her health problem and she had to quit or be fired. Montano responded that Dr. Puddy would not release her until after June 10th and she was not going to give up. Plaintiff was then fired. The termination upset plaintiff and worsened her condition. She called Dr. Puddy and demanded an explanation. He assured her that he had said nothing to PNB which caused her dismissal.

On approximately May 27, 1977, Ms. O'Malley decided to ask Montano to return to work. This decision was made without consulting the medical department. Four days later at a meeting with two CWA representatives Fechner and O'Malley offered to allow plaintiff to return to work starting June 6, 1977, (Montano knew of the meeting but decided not to attend).

Throughout the discussions regarding plaintiff's return, both O'Malley and District Manager Hines were aware that Dr. Puddy had not released Montano as able to return to work. Neither O'Malley or Hines requested a medical department review of the matter. Montano turned down the offer to return. She testified that she did not feel she was "ready" to return. She did not, however, consult with Dr. Puddy. Plaintiff's refusal to return resulted in the reinstatement of her previous dismissal.

Shortly thereafter, Montano filed a grievance with CWA over her termination. All local steps were completed and the grievance was referred to the CWA Area Director's office in Seattle.

The mechanics of the grievance procedures are rather informal. Meetings take place every few months, with as many as twenty claims discussed at a single meeting.

Some grievances are resolved in one meeting, some are carried over to the next meeting. Grievances may be denied orally or in writing; some verbal denials are "confirmed" by subsequent letter. Following denial the union has thirty days to request arbitration.

Montano's grievance was handled by CWA Area Director Frank Mailloux. He initially presented plaintiff's grievance in August of 1977. It was carried over to the next meeting in October. At a meeting held October 6th, Mailloux conferred with Mr. C. B. Scott, PNB's Assistant Vice President of Labor Relations. Scott verbally denied Montano's claim. Mailloux did not understand Scott's response to be a final denial. On October 25, 1977 Mailloux received a letter dated October 19, 1977 "confirming" the verbal denial. On November 29, 1977 Mailloux mailed the arbitration request to PNB. It was not received until December 5, 1977. The arbitration request was past the requisite thirty days and was denied.[2] Plaintiff's recourse was to the courts. She brought this action in May of 1980 against CWA. In September of 1982 she amended her complaint and joined PNB as a party defendant.[3]

Two major issues are presented. First, whether CWA breached its duty of fair representation to plaintiff. Second, whether plaintiff was discharged in violation of the CWA/PNB collective bargaining agreement.

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[2] The issue of when the denial was given was submitted to arbitration. The arbitrator concluded that, "the probabilities are very strong that the company gave final verbal denial at the grievance meeting October 6."

[3] A majority of the pre-trial maneuvering in this case concerned the statute of limitations issue. In *DelCostello v. Teamsters*, —— U.S. ——, 103 S.Ct. 2281 (1983), the Supreme Court found that period to be six months. The Ninth Circuit has refused to apply *DelCostello* retroactively to cases filed prior to *DelCostello*. *Edwards v. Teamsters*, 719 F.2d 1036 (9th Cir. 1983). On March 4, 1984 the Supreme Court denied cert. on *Edwards*. Therefore, plaintiff's claim is not barred.

DUTY OF FAIR REPRESENTATION

To establish a breach of the union's duty of fair representation, an employee must show that the union's conduct was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The record reflects no hint of hostility, bad faith or discriminatory intent in CWA's handling of Montano's grievance. The union was, however, negligent. It had a duty to know when the grievance was denied and perfect a timely arbitration request. The issue is whether this type of negligence is enough to establish a breach of the union's duty of fair representation.

This Circuit has previously followed a general rule that simple negligence in the delay or failure to process a grievance is not enough to establish a breach of the duty of fair representation. *Stephens v. Postmaster General*, 623 F.2d 594 (9th Cir. 1980); *Dente v. International Organization of Masters Local 910*, 492 F.2d 10 (9th Cir. 1973) *cert denied* 417 U.S. 910 (1974).

This analysis was altered in the case of *Dutrisac v. Caterpillar Tractor Company*, No. 81-4251 (9th Cir. July 19, 1983). *Dutrisac* distinguishes between various types of negligent conduct. Simple negligence is insufficient in cases involving a union's *evaluation* of the merits of a grievance, *see e.g., Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1355 (9th Cir. 1981); a union's *interpretation* of the collective bargaining agreement, *see e.g., Ethier v. United States Postal Service*, 590 F.2d 733, 736 (8th Cir. 1979), *cert denied* 444 U.S. 826 (1979); or a union's *presentation* of the grievance at the arbitration hearing, *see e.g. Ness v. Safeway Stores, Inc.*, 598 F.2d 558, 560 (9th Cir. 1979). Where, however, the union conduct is not based on an erroneous decision, "but [the union's] failure to perform a ministerial act required to carry out the decision, courts have been more than willing to impose liability for merely negligent conduct." *Dutrisac, supra*, slip op. at 3477.

Here CWA claims its negligence (if any) was in the interpretation of the collective bargaining agreement. The union argues that it acted on a reasonable interpretation of the contract that its time for requesting arbitration ran from the date it received PNB's letter denying plaintiff's grievance. This would be a valid argument had the evidence established that PNB policy was to deny grievances only by letter and/or that the time to request arbitration ran from receipt of such a letter. The evidence does not establish the former or the latter. The contract between CWA and PNB does not require written denials and Mr. Mailloux testified there are many cases where only verbal denials are given. CWA's negligence was in failing to realize that Ms. Montano's grievance had been denied on October 6, 1977; and in not perfecting a timely request within 30 days of that date.[4] CWA's failure was in a ministerial, not interpretive function. The union's unexcused and unexplained failure, though simple negligence, completely extinguished plaintiff's claim. The stakes were too high to make such a mistake. CWA is liable for the breach of its duty of fair representation. *Dutrisac, supra.*

This conclusion would normally put the issue to rest. A problem remains, however. Two months after the *Dutrisac* decision, the Ninth Circuit decided *Clayton v. Republic Airlines*, 716 F.2d 729 (9th Cir. 1982). *Clayton* involved the issue of a district court's jurisdiction to hear a duty of fair representation claim in the context of an airline merger. In dictum, the Court stated, ". . . we note that in order to breach its duty [of fair representation] a union's conduct must be egregious (citation omitted). A union breaches its duty to fairly represent

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[4] It should be noted that this was not a situation where there was an error in CWA's evaluation of the merits of the grievance. *See Singer v. Flying Tiger Line, Inc., supra.* Mr. Mailloux testified that CWA automatically requests arbitration on all grievances involving termination of employment.

its members only if it is dishonest or arbitrary, acts in bad faith, or with personal hostility. In this circuit mere negligence is not enough" *Clayton*, at 732. There is no mention of *Dutrisac*. To further complicate matters, there is a pending petition in *Dutrisac* for rehearing en banc.

If *Dutrisac* is the law of this circuit, CWA's negligence breached its duty of fair representation. If *Clayton* is the law, no such breach occurred. I conclude that *Dutrisac* is applicable under the peculiar facts of this case.

TERMINATION

Plaintiff was discharged when she refused to return to work after PNB concluded she was not disabled. PNB argues that its termination of plaintiff was for just cause because it reasonably believed that Montano was incapable of working. The key here is the reasonableness of PNB's belief that plaintiff was not disabled when it demanded her return.

PNB's disability evaluations and procedures are governed by Company Instruction 107. To determine the reasonableness of PNB's actions a brief overview of 107 is helpful.[5]

Instruction 107 is subtitled "Direct Medical Reporting Plan." Under the Plan, separate reports are completed by the employee's immediate supervisor and personal physician. The supervisor's report (B 360) is filled out on a weekly basis by both employee and supervisor. It allows the supervisor to make personal observations and conclusions regarding the employee's ability to return to work. The personal physician's report (B 402) is filled out less frequently but contains more information. It asks the doctor's opinion when the employee can return to work.

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[5] Carolyn Keyser, Labor Relations consultant with PNB followed the case and helped in its presentation. She testified that PNB's actions were appropriate and in compliance with Instruction 107.

If a return date is indefinite, medical reasons are requested to explain the absence. All supervisor and physician reports are forwarded to the medical department and reviewed. If the cause or length of the disability is questioned, the PNB medical department doctor contacts the employee's personal physician for more information. If the cause of the disability is clear and the length of disability reasonable, the medical department generates and sends to the supervisor a form B 404. This states, among other things, the general nature of the employee's disability and the estimated date of return which has been jointly decided by the medical department and the personal physician. After receipt of the B 404 information (which may be oral or written), the supervisor notifies the employee of the expected return date. When an employee does not return on the appointed date and states an inability to do so, Instruction 107 requires prompt notification of the medical department and further investigation by the medical department, "usually by questioning the personal physician."

Turning to the facts of his case, it is clear that the initial call from Doctor Ahern to Doctor Puddy was made pursuant to Instruction 107. Ahern requested more information regarding Montano's illness probably due to the concern voiced over the propriety of collecting benefits while attending community college classes. The single eight to ten minute call was the basis of a misunderstanding which compounded itself as it went up and down the chain of command and ultimately cost plaintiff her job. By the time the order to "confront" Montano about return to work in the "immediate future" reached plaintiff, it had become a demand to return to work on the following Monday, ostensibly because her doctor had released her. Montano's refusal to return triggered Section 4.26 of Instruction 107. This resulted in the prompt notification of the medical department and the conference call the next day. At the conference call Dr. Hagen approved

the quit-fire option when he concluded that Montano's job was the cause of her problems. Just how badly the initial conversation had been twisted is reflected by Dr. Hagen's May 23, 1977 memo to the benefits committee:

> Following a telephone conversation with the employee's private physician on May 10, 1977 along with knowledge of her activities while receiving benefits, the Medical Department and her private physician concurs that benefits should be terminated as of May 16, 1977.

Against this background PNB argues that it acted reasonably under the circumstances and information available at the time. *Cook v. United States Dept. of Labor*, 688 F.2d 669 (9th Cir. 1982). As will be shown, however, there was sufficient information in PNB records and other "loose ends" known to PNB personnel which would lead a reasonable person to investigate further into the Montano situation. The failure to conduct reasonable inquiry under these circumstances militates against a finding that plaintiff was terminated for just cause.[6]

There are several events which indicate a lack of reasonable communication and effort to follow company policy. Dr. Ahern's memo regarding Montano's return to work directs the field to talk to plaintiff about returning to work in the "immediate future", no date is given. Dr. Puddy concurred that Montano could be talked to in this vein, but there is no indication that he had released her as fit to work. The return date itself was not jointly determined by Dr. Puddy and Dr. Ahern, as contem-

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[6] The applicable test is found in Article 9, § 9.1(e) of the PNB/CWA collective bargaining agreement:

> The arbitrator shall determine whether the suspension or the dismissal was for just cause, but he may substitute his judgment for that of the Company only if he finds that the Company acted without making a reasonable investigation or that it acted upon evidence that would not have led a reasonable person to take such action.

plated by Company policy; instead the May 16th return date was rather arbitrarily decided by a nurse and a lay person.

When Montano stated she could not return on May 16th, PNB failed in its duty to investigate further. A reasonable investigation would have revealed two things. First, that the two reports supposedly relied upon by the medical department in evaluating disabilities (the supervisors and physicians) reflected the same conclusion —Montano was not fit to return to work. Secondly, at the conference call held May 13th, Spokane management was aware that Dr. Puddy had not released plaintiff to return to work. The medical department either overlooked this or disbelieved it. While consultation with the personal physician is not mandatory under company policy, a reasonable person faced with this conflicting information would investigate in some manner to confirm or deny these inconsistencies. The most simple and reasonable method would seemingly be a call to Dr. Puddy. If not satisfied with Dr. Puddy's explanation, PNB policy provides for a second opinion by a doctor of PNB's choosing. Instead of contacting Dr. Puddy (or even reviewing the latest reports), Dr. Hagen relied totally on Dr. Ahern's memo, concluded that Montano's job was the root of her problems and authorized the quit-fire option. Plaintiff was dismissed.[7]

Under the facts and circumstances previously discussed, the evidence in PNB's possession was not so substantial and uncontradicted that the Company was excused from investigating further. I conclude that Montano was dismissed without just cause because PNB acted without making a reasonable investigation.

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[7] The fact that this conclusion was reached over the phone by a non-psychiatrist makes it somewhat curious in light of the fact that only three days prior Dr. Puddy (known by Dr. Hagen to be very competent) had supposedly released Montano as fit to return to a job which was now considered the root of her problems.

DAMAGES

To be made whole from her unjust termination and breach of the union's duty of fair representation Ms. Montano is entitled to back pay and reinstatement to her former job.[8]

The award of back pay raises the issue of whether PNB's reinstatement offer of May 31, 1977 terminates back pay liability. Absent special circumstances, an unconditional offer of reinstatement terminates back pay liability. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982). Such circumstances exist here. Approximately two weeks after relying totally upon the medical department's opinion to fire Montano because her job was the root of her problems, Spokane management offered plaintiff her job back without consulting the medical department and with knowledge that Montano had still never been released by Dr. Puddy. This rather hollow offer qualifies as a "special circumstance" under *Ford Motor, supra* and does not cut off plaintiff's back pay damages. The amount of back pay has been stipulated to by counsel and submitted as part of the pretrial order. Total back pay up to the time of trial is $100,503.00. This amount is reduced by alternate employment, rent assistance and unemployment benefits in the amount of $25,944.00, leaving defendants liable to plaintiff in the amount of $74,559. Apportionment of damages between PNB and CWA in accordance with *Bowen v. United States Postal Service*, —— U.S. ——, 103 S.Ct. 588 (1983) has been reserved for later determination by the court or possible stipulation by the defendants.

As to reinstatement, the court is guided by the testimony of three people. Plaintiff herself testified that she felt fine and wished to return to work; Dr. Richard Dennie, a psychologist who examined Mrs. Montano prior

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[8] At the close of trial plaintiff waived her claim for damages for emotional distress.

to trial, found her to be psychologically intact and able to work full-time. Plaintiff's immediate supervisor at PNB, Betty Fechner, testified that but for Montano's health problems she (Montano) would have been able to do her job and would have done so far a long time. Since plaintiff's problems are apparently behind her, reinstatement is proper.

CONCLUSION

1. Defendants are liable to plaintiff in the amount of $74,559.00 plus interest.

2. Mrs. Montano will be reinstated as soon as reasonably possible.

3. Plaintiff shall recover reasonable attorney fees and costs of this action.

If the parties cannot agree upon apportionment of damages and the amount of attorney fees and costs, a hearing will be held. Counsel shall report to the court by telephone within twenty days of receipt of this Order.

This Decision includes the Findings of Fact and Conclusions of Law. Fed.R.Civ.P. 52(b).

IT IS SO ORDERED.

DONE BY THE COURT this 10th day of August, 1984.

/s/ Robert J. McNichols
ROBERT J. MCNICHOLS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-35074

DC# CV-80-378-RJM

MADELINE MONTANO,
Plaintiff/Appellee,

vs.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
DISTRICT 9,
Defendant/Appellant.

ORDER

[Filed May 24, 1990]

Before: SCHROEDER, Circuit Judge

Appellant's motion for extension of time to filed petition for rehearing to and including May 30, 1990 is GRANTED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-35074

D.C. #CV-80-387-RJM
(Eastern Washington)

MADELINE MONTANO,
Plaintiff-Appellee,

v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
DISTRICT 9,
Defendant-Appellant.

ORDER

[Filed Jul. 9, 1990]

Before: GOODWIN, Chief Judge, SCHROEDER and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

SUPREME COURT OF THE UNITED STATES

No. A-217

COMMUNICATIONS WORKERS OF AMERICA,
Petitioner

v.

MADELINE MONTANO

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 6, 1990.

/s/ Sandra Day O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 19th day of September, 1990.

(3)

No. 90-729

JAN 16 1991

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

MADELINE MONTANO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUGGESTION OF MOOTNESS

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IN THE

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COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
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v.

MADELINE MONTANO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

SUGGESTION OF MOOTNESS

The parties to this case have reached an agreement whereby all of the plaintiff's claims against the defendant are completely satisfied. This case is thus moot.[1] The petitioner, therefore, requests that the Court vacate the judgments of the courts below, and remand this case with directions to dismiss. *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950).[2]

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[1] With respect to the petition for a writ of *certiorari*, the settlement expressly provides that "CWA will inform the Court that as a result of this settlement agreement, this case has become moot." Settlement and Release Agreement ¶ 2.

[2] In *United States v. Munsingwear, supra*, the Court explained, "The establishment practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39 (footnote citing examples omitted).

The petition for *certiorari* in this case raises two issues that would have warranted this Court's attention, had this case not become moot.

The first question presented is whether the courts below erred in holding that a union breaches its duty of fair representation by committing an act of simple negligence in handling a contract grievance. The petition demonstrates that this holding of the courts below conflicts with the Court's recent decision in *Steelworkers v. Rawson*, —— U.S. ——, 110 S.Ct. 1904 (1990). Pet. 9-10. The petition goes on to suggest that, if *Rawson* does not completely resolve this issue, there exists a conflict between the Ninth Circuit on the one hand and the Seventh and Third Circuits on the other that may be resolved in *Air Line Pilots Ass'n v. O'Neill*, Sup. Ct. No. 89-1493. Pet. 10-12.

The second question presented concerns the correct allocation of back pay damages between unions and employers in hybrid § 301/fair representation cases, where the union has *not* refused to proceed to arbitration but has made an administrative mistake that allows the employer to avoid arbitration. The petition notes that this issue was not resolved in *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983), and demonstrates that the decisions below conflict with the reasoning of the *Bowen* opinion. Pet. 13-15.

Because the petition in this case raised issues worthy of this Court's consideration, the fact that the case became moot after the petition was filed cuts short the full process of appellate review. In these circumstances, we respectfully suggest that the proper course is to grant the petition for a writ of *certiorari*, vacate the judgments below and remand the case with directions to dismiss, *See, e.g., Onwuasoanya v. United States*, 488 U.S. 920 (1988).

Respectfully submitted,

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